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No. 02-1672

IN THE
Supreme Court of the United States

RODERICK JACKSON,
PETITIONER,

v.

BIRMINGHAM BOARD OF EDUCATION,
RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF NATIONAL WRESTLING COACHES ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1
ISSUE PRESENTED 2
SUMMARY OF ARGUMENT 2
FACTUAL BACKGROUND 3
ARGUMENT 4
I. THIRD-PARTY RETALIATION IS NOT GENDER DISCRIMINATION 4
A. Title IX Adopts the Constitutional, Intentional-Discrimination, Gender-Based Standard 4
B. Third-Party Retaliation Does Not Fall within Title IX's Discrimination Standard 5
C. Agencies' Section 902 Authorization Is Less Broad than Section 901(a)'s Prohibition 8
II. THIRD-PARTY RETALIATION LACKS AN IMPLIED PRIVATE RIGHT OF ACTION 11
III. SCHOOLS HAVE NO NOTICE OF LIABILITY FOR THIRD-PARTY RETALIATION 13
A. Title IX's Statutory Terms Provide No Notice 13
B. Title IX Caselaw Provides No Notice 14
C. Title IX Regulation Provides No Notice 14
D. Agency Documents Issued outside Section 902 Have No Effect and, thus, Provide No Notice 15
IV. EDUCATORS HAVE RETALIATION REMEDIES 22
V. THIS COURT SHOULD NOT PROPAGATE MISSTATEMENTS BY *AMICI CURIAE* 24
A. *Amici Curiae* Overstate Increases in Scholastic and Collegiate Athletic Opportunities 25
B. *Amicus Curiae* Misidentifies Title IX's Author and Codification 27
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) .....*passim*

Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Assoc., 558 F.Supp. 487 (D.D.C. 1983), aff'd 735 F.2d 577 (D.C. Cir. 1984) 27

Barnes v. Gorman, 536 U.S. 181 (2002).....13

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).....7

Brillhart v. Philips Electronics North America Corp., 179 F.3d 1271 (10th Cir. 1999).....12, 23

Cannon v. University of Chicago, 441 U.S. 677 (1979).....11, 12, 15

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).....13

Connick v. Myers, 461 U.S. 138 (1983) 22

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) ..17

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).....5, 20

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).....2

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).....8

Great American Federal Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979).....6

Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987).19

Holt v. Lewis, 955 F.Supp. 1385 (N.D. Ala. 1995), aff'd, 109 F.3d 771 (11th Cir.), cert. denied, 522 U.S. 817 (1997).....14

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).....24

North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).....8-10, 16, 21

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).....2, 6

Pederson v. Louisiana State Univ., 201 F.3d 388 (5th Cir. 2000), aff'd in part, rev'd in part, 213 F.3d 858 (5th Cir. 2000) 20

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979).....7

Pickering v. Board of Ed. of Township High School Dist. 205, 391 U.S. 563 (1968).....12, 22

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) 24

Skidmore v. Swift & Co., 323 U.S. 134 (1944).....20

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).....7, 8

United States v. Fordice, 505 U.S. 717 (1992) 15, 19

Village of Willowbrook v. Olech, 528 U.S. 562 (2000).....8, 12, 22

Waters v. Churchill, 511 U.S. 661 (1994).....10

Constitutional Provisions

Spending Clause, U.S. CONST. Art. I, § 8, cl. 1 .....2, 13

Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3.....2

First Amendment, U.S. CONST. Amend. I 3, 10, 22

Thirteenth Amendment, U.S. CONST. Amend. XIII.....7

Fourteenth Amendment, U.S. CONST. Amend. XIV, § 1.2, 20

Statutes

Higher Education Act of 1965, 20 U.S.C. §§ 1001 et seq.27-29

Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.....*passim*

20 U.S.C. § 1681(a).....*passim*

20 U.S.C. § 1681(b) 29-30

20 U.S.C. § 1682 ..... *passim*
20 U.S.C. § 3441(a)(2)(B) 29
20 U.S.C. § 3505(a) 17, 22
42 U.S.C. § 1982 7
42 U.S.C. § 1985(3) 7
Title VI, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. ..... *passim*
42 U.S.C. § 2000d ..... *passim*
Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ..... *passim*
Pub. L. No. 92-318, §§ 901-907 (1972) 28, 29
Pub. L. No. 92-318, § 1001 (1972) 28
Pub. L. No. 93-112 (1973) 17, 18

Legislative History

110 Cong. Rec. 11,926 (1964) 9
110 Cong. Rec. 11,930 (1964) 9
110 Cong. Rec. 11,941 (1964) 9, 17
110 Cong. Rec. 12,689 (1964) 9
110 Cong. Rec. 12,707 (1964) 10
110 Cong. Rec. 12,716 (1964) 17
110 Cong. Rec. 13,333 (1964) 4
110 Cong. Rec. 13,334 (1964) 17
110 Cong. Rec. 13,377 (1964) 17
110 Cong. Rec. 13,442 (1964) 5
110 Cong. Rec. 1521 (1964) 9
110 Cong. Rec. 1527 (1964) 20
110 Cong. Rec. 1602 (1964) 9
110 Cong. Rec. 2499-00 (1964) 16
110 Cong. Rec. 5254 (1964) 4
110 Cong. Rec. 5255 (1964) 4

110 Cong. Rec. 5256 (1964) 16
110 Cong. Rec. 6544 (1964) 16
110 Cong. Rec. 6545-46 (1964) 9
110 Cong. Rec. 6546 (1964) 20
110 Cong. Rec. 6553 (1964) 5
110 Cong. Rec. 6562 (1964) 10, 16
110 Cong. Rec. 6749 (1964) 16
110 Cong. Rec. 6988 (1964) 16
110 Cong. Rec. 7058 (1964) 17
110 Cong. Rec. 7059 (1964) 10
110 Cong. Rec. 7064 (1964) 5
110 Cong. Rec. 7066 (1964) 17
110 Cong. Rec. 7067 (1964) 17
110 Cong. Rec. 7103 (1964) 17
110 Cong. Rec. 7213 (1964) 6
117 Cong. Rec. 30,399 (1971) 27
117 Cong. Rec. 30,404 (1971) 5
117 Cong. Rec. 30,415 (1971) 27
117 Cong. Rec. 39,262 (1971) 29
Higher Education Act of 1971, 117 Cong. Rec. 9821 (1971) 27
118 Cong. Rec. 5802-14 (1972) 29
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118 Cong. Rec. 5803 (1972) 10
118 Cong. Rec. 5804 (1972) 29
118 Cong. Rec. 5807 (1972) 16
118 Cong. Rec. 5808 (1972) 10
H.R. Rep. No. 92- 554, reprinted in 1972 U.S.C.C.A.N. 2548 28
S. Conf. Rep. No. 92-798, reprinted in 1972 U.S.C.C.A.N. 2608 28

Rules and Regulations

34 C.F.R. § 100.7(e) 12, 15
34 C.F.R. § 100.8(d) 14
45 C.F.R. § 80.7(e) 12, 15
45 C.F.R. § 80.8(d) 13, 14
44 Fed. Reg. 71,413 (1979) 21
45 Fed. Reg. 72,995 (1980) (Executive Order 12,250) .. 16, 17
45 Fed. Reg. 74,676 (1980) 24
46 Fed. Reg. 29,704 (1981) 16
46 Fed. Reg. 40,686 (1981) 17
62 Fed. Reg. 12,034 (1997) 21
65 Fed. Reg. 66,092 (2000) 21

Other Authorities

Comment, Implementing Title IX: The HEW Regulations, 124 Pa. L. Rev. 806 (1976) 27
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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National Wrestling Coaches Association ("NWCA"), a nonprofit Iowa corporation headquartered in Manheim, Pennsylvania, Through its institutional and individual members, NWCA represents student-athletes, parents, coaches, booster groups, save-our-sport groups, and alumni nationwide. Since its founding in 1928, *amicus curiae* NWCA has supported amateur wrestling at the interscholastic, intercollegiate, and club levels. Since 2002, that support has included advocacy on issues under Title IX.

This litigation raises important questions for NWCA's members and its mission. While some of its coach members would prefer the blanket legal protections sought by Coach Jackson, NWCA's coach members also support its campaign to bring balance back to Title IX implementation and enforcement. Simply put, it risks driving schools out of athletics altogether to allow a suit to continue under a complaint that (a) does not state a claim under Title IX for retaliation *because of gender*, (b) does not even allege any underlying discrimination *because of gender*, and (c) fails to comply with the regulatory prerequisites for a regulation-based suit.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

ISSUE PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), encompasses redress for retaliation for complaints about unlawful sex discrimination?

SUMMARY OF ARGUMENT

Patterned on the Civil Rights Act of 1964's Section 601, Title IX's Section 901(a) broadly provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). By its terms, Title IX's sweep extends only to discrimination "on the basis of sex" (*i.e., because of gender*). *Id.* While it has interpreted the sweep of Section 901(a) broadly to include employment and sexual harassment, *e.g., Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74 (1992) ("when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"), this Court never has read the "because of gender" requirement out of the statute.

If the manifest sexual abuse in *Oncale v. Sundowner Offshore Services, Inc.* nonetheless required a showing that it "actually constituted "*discrimina[tion]* . . . because of . . . sex," 523 U.S. 75, 81 (1998) (emphasis and ellipses in original) under Commerce-Clause and Fourteenth-Amendment legislation like Title VII, then there is no question that the failure to satisfy the "because of gender" requirement is dispositive under Spending-Clause legislation like Title IX. In summary, *amicus curiae* NWCA makes three principal arguments:

1. Retaliation for advocacy on behalf of third parties is not discrimination *because of gender* cognizable under Title IX.

2. Such retaliation would not qualify for an implied private right of action, even if this Court undertook its now-disfavored implied-right analysis.

3. Schools have no notice of liability for such retaliation, which precludes liability under Spending-Clause legislation like Title IX.

Significantly, under the foregoing framework, anyone (third party or not) retaliated against *because of their gender* has an action under Title IX. But no-one, including Coach Jackson, has an action for conduct that does not violate Title IX's gender-based discrimination standard. Similarly situated coaches could, however, sue under the First Amendment or under Title VII. Finally, *amicus curiae* NWCA attempts to rebut various factual misstatements made by *amici curiae* in support of Coach Jackson, which could do mischief if propagated *ex cathedra* by this Court without the benefit and direct focus of an adversary proceeding.

FACTUAL BACKGROUND

Amicus curiae NWCA adopts the facts reported in the Eleventh Circuit's decision. 309 F.3d at 1335-36. In addition, the complaint does not allege several essential elements of a Title IX retaliation claim: (a) that Birmingham is a recipient of federal education-related funds; (b) that Coach Jackson's complaining caused Birmingham to retaliate; (c) that Coach

Jackson first filed (or otherwise participated in) an administrative complaint; (d) that Birmingham acted because of gender, either against Coach Jackson or against the girls' basketball team, and (e) that Birmingham treated boy athletes any differently with respect to expense accounts, equipment, and padlocks.

ARGUMENT

I. THIRD-PARTY RETALIATION IS NOT GENDER DISCRIMINATION

Title IX prohibits only intentional discrimination *because of gender*, which does not encompass retaliation because of speech. Section 902 does not authorize agency regulations to prohibit such retaliation.

A. Title IX Adopts the Constitutional, Intentional-Discrimination, Gender-Based Standard

Like Title VI, Title IX addresses intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 282 & n.2 (2001). Its legislative history makes clear that Title VI merely restates constitutional law and establishes a process to implement that law to ensure that the federal government did not support race discrimination through federal funding. *See, e.g.*, 110 Cong. Rec. 13,333 (1964) ("there is a constitutional restriction against discrimination in the use of Federal funds; and Title VI simply spells out the procedure to be used in enforcing that restriction") (Sen. Ribicoff).[2] As its text and

[2] *See also, e.g.*, 110 Cong. Rec. 5254 ("The existing law of the land is stated in section 601") (Sen. Humphrey); 110 Cong. Rec. 5255 ("No new

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legislative history make clear, *compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d; 117 Cong. Rec. 30,404 (1971) (Sen. Bayh), Title IX adopts the Title VI model.

B. Third-Party Retaliation Does Not Fall within Title IX's Discrimination Standard

With Title IX's statutory prohibition plainly and expressly limited to intentional discrimination *because of gender*, 20 U.S.C. § 1681(a), Title IX simply does not cover retaliation because of a non-gender reason (here, third-party advocacy). This Court frequently relies on Title VII precedents where applicable to its Title IX jurisprudence, *e.g., Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999) (*citing Oncale*, 523 U.S. at 82, *and Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)), and this Court should do so here.

As Title VII's legislative history makes clear, far from an integral element of the statutory "discrimination"

(Footnote cont'd from previous page.)

rights are granted here nor are any taken away") (Sen. Humphrey); 110 Cong. Rec. 6553 ("[the bill] provides that race shall not be a basis for making decisions") (Sen. Humphrey); 110 Cong. Rec. 7064 (confirms question that Title VI is already the law) (Sen. Pastore); 110 Cong. Rec. 13,442 ("Section 601 is a policy statement on constitutional law") (Sen. Humphrey). Senators Humphrey and Kuchel were the floor managers for the Civil Rights Act of 1964, Senators Cotton and Pastore were the floor managers for Title VI, Senators Case and Clark were the floor managers for Title VII, Representative Celler and McCulloch were the floor managers in the House, and Senators Ribicoff and Javits participated with the bipartisan leadership on Title VI.

protection, retaliation protection for third-party advocacy is "ancillary." 110 Cong. Rec. 7213 (1964) (prepared statement submitted jointly by floor managers for Title VII, Sen. Clark and Sen. Case); *cf. Great American Federal Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 387-88 (1979) ("retaliation for efforts to aid others" is distinct from "discriminat[ion] on the basis of . . . sex") (White, J. dissenting). By including this "ancillary" provision in Title VII, but not in Title VI, Congress implicitly foreclosed a third-party retaliation action under Title VI, and thus Title IX.

Not all retaliation is retaliation *because of gender,* just as not all harassment is *sexual* harassment.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Oncale, 523 U.S. at 81 (emphasis and ellipses in original, citations omitted). Likewise, the crucial issue for Title IX (or Title VI) is the statutory text, which prohibits all discrimination – including retaliation – *because of gender* (or race), but not all retaliation.[3]

Although *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969) predates Title IX, it postdates Title VI. Thus, Congress would have expected this Court to interpret Title IX consistent with its template (Title VI) rather than a much different statute, adopted under the different (and far more remedial) authority of the Thirteenth Amendment. Thus, the Court should reject again the "contemporary legal context" argument, *Sandoval,* 532 U.S. at 288, and instead should "focus not on the similarities of the two provisions, but on their differences." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 354 (1993) (*comparing* U.S. CONST., Amend. XIV, § 1 *with* 42 U.S.C. § 1985(3)) (O'Connor, J., dissenting).

The *Sullivan* statute provides a more complete and more affirmative grant of rights than do Title IX and Title VI. *Compare* 42 U.S.C. § 1982 *with* 20 U.S.C. § 1681(a) *and* 42 U.S.C. § 2000d. Whereas the two Spending-Clause statutes apply only to specific types of discrimination (because of gender or of race), committed only by recipients of federal funds, the Thirteenth-Amendment statute far more broadly and affirmatively grants rights against actions by all private parties. *See Bray,* 506 U.S. at 354. Under this analysis,

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[3] Actions taken because of gender are those where "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added).

Sullivan provides no basis to infer a private right of action for third-party retaliation under Title IX.[4]

C. Agencies' Section 902 Authorization Is Less Broad than Section 901(a)'s Prohibition

In *North Haven Bd. of Educ. v. Bell,* this Court upheld Title IX employment regulations, giving Title IX a sweep as broad as Section 901(a)'s prohibition against intentional gender-based discrimination. 456 U.S. 512, 521 (1982). Conversely, of course, no section of any statute has a sweep *more broad* than its language and history. And all statutes must be read to include all sections. *Amicus curiae* NWCA submits that *North Haven* failed adequately to consider the statutory language and legislative history of Section 902. Although that failure may not have affected the ultimate outcome in *North Haven,* it could have meaningfully affected the terms of the decision.

Specifically, *North Haven* compared the interplay of Title IV's Section 601 and 604 with Title IX's Section 901(a) and no analogue to Section 604 (the conference committee removed it from the House bill). 456 U.S. at 527-30. The Court failed to consider that Section 902 and Section 602 expressly limit agencies' rulemaking authority to rules "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682; 42 U.S.C. § 2000d-1. The legislative history makes clear that the language *limited,* rather than expanded, agencies' authority: for example, it prevented the regulation of both the farm employment practices of a recipient of crop subsidies and the general employment practices of a contractor who does not discriminate on its government contracts. *See, e.g.,* 110 Cong. Rec. 1521 (Rep. Celler) ("Title VI would not require action to end discriminatory employment practices by farmers receiving allotments"); 110 Cong. Rec. 1602 (Rep. Mathias); 110 Cong. Rec. 6545-46 (Sen. Humphrey); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy submitted by Sen. Cooper). Significantly, all of the foregoing legislative history *predates* Section 604's appearing in Senator Dirksen's amendment in the nature of a substitute. 110 Cong. Rec. 11,926, 11,930 (Amendment 656).[5]

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[4] Several *amici curiae* raise the concern this Court's sexual-harassment caselaw requires victims to notify the school before the school becomes liable, which requires that students feel free from retaliation before they can redeem their protection from harassment. However harsh it may appear, "private rights of action to enforce federal law must be created by Congress [and] courts may not create [them], no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval,* 532 U.S. at 286-87. In practice, moreover, the harassment-notice requirement is neither harsh nor in conflict with Birmingham's position here. The harassment victim must notify a school official high enough to take action to correct the harassment. *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 285 (1998). However that official responds, the harassment victim discharges the *Gebser* obligation by that notice. If, after notice, the school fails to meet its obligations, the harassment victim has a private cause of action against the school under *Gebser.* Adding or subtracting a separate and additional private right for retaliation does not materially alter the outcome. Further, dual harassment-retaliation victims at public schools likely could bring a separate equal-protection action for the retaliation. *See, e.g., Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).

[5] *See also* 110 Cong. Rec. 12,689 (1964) (Sen. Saltonstall).

As Senator Bayh acknowledged, Title IX would have the same procedural protections afforded under Title VI, 118 Cong. Rec. 5803,[6] and Section 602's protection against bureaucratic overreaching was a vital one of those protections. *See, e.g.*, 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore). Thus, the Title IX conference committee's omission of Section 604 from Title IX merely constitutes the removal of redundant language. *See North Haven*, 456 U.S. at 546-50 (Powell, J. dissenting); 110 Cong. Rec. 12,707 (1964) (Section 604 merely "expressed in specific legislative language what had always been intended") (Sen. Humphrey). The upshot is that – whether or not this Court rightly decided *North Haven* – neither the *North Haven* analysis nor the relevant statutes give the Department any authority over retaliation, outside the Department's own administrative proceedings.[7]

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[6] *See also* 118 Cong. Rec. 5808 ("These provisions [including what became Section 902] parallel Title VI of the 1964 Civil Rights Act") (fact sheet submitted by Sen. Bayh); *see also* 1975 Hearings, at 170 ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

[7] *Cf. Waters v. Churchill*, 511 U.S. 661, 694-95 (1994) ("Every American has the right to express an opinion [but] the exercise of that right may entail unpleasant consequences [absent] some contractual or statutory provision limiting [the employer's] prerogatives") (Stevens, J., dissenting). As indicated in Section IV, *infra*, however, Coach Jackson had a cause of action under the First Amendment, which it declined to bring.

II. THIRD-PARTY RETALIATION LACKS AN IMPLIED PRIVATE RIGHT OF ACTION

In 1979, this Court determined that Title IX implies a private right of action to enforce Section 901(a)'s statutory prohibition against intentional, gender-based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677, 687-88 (1979). In 2001, this Court rejected an invitation to apply the now-disfavored, implied-rights analysis to enable third-party beneficiaries to enforce regulations that exceed the statutory prohibition. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (declining to expand implied private action because "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink").

To the extent that the Court would consider it, the *Cannon* implied-right analysis would not provide Coach Jackson with an implied right here. That analysis involves a four-factor test: (1) did Congress enact the statute for the "*especial* benefit" of this plaintiff class; (2) does the legislative history explicitly or implicitly indicate an intent to create or to deny a remedy; (3) is it consistent with the legislation's purpose to imply a remedy for the plaintiff; and (4) would it be inappropriate to infer an action solely on federal law (*e.g.*, does the area traditionally fall under state law). *Cannon*, 441 U.S. at 688-89 & n.9 (emphasis in original). Under these criteria, Title IX would not support an implied private remedy for third-party retaliation, even if the Court were inclined to conduct the analysis.

In its threshold question of the benefited class, *Cannon* contrasted statutes such as Title IX and the Voting Rights Act of 1965 (which provide that no person shall suffer the

identified statutory harm) with criminal statutes (which enacted prohibitions designed to benefit the general public). *Cannon*, 441 U.S. at 689-91 (citing cases). Unfortunately, Congress expressly tailored Title IX and Title VI to provide the right to be free from gender and race discrimination, 20 U.S.C. § 1681(a), 42 U.S.C. § 2000d, without including the full panoply of other rights (*e.g.*, freedom of speech, freedom from arbitrary and irrational actions). *Cf. Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968) (speech); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (arbitrary state action).[8] By their terms, therefore, neither Title IX nor Title VI evince any intent (much less an *especial* intent) to protect individuals from third-party retaliation. Further, the anti-retaliation regulation is cast more in terms of proscribing conduct by recipients, 45 C.F.R. § 80.7(e) ("No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual"); 34 C.F.R. § 100.7(e), which correlates more closely to statutes that lack a private cause of action. *See Cannon*, 441 U.S. at 693 n.13 (citing cases).

In addition to failing at the threshold, an immediate right of action for third-party retaliation also conflicts with the administrative exhaustion requirement of the most analogous express cause of action (Title VII). This strongly suggests a need to exhaust administrative remedies before upsetting

[8] Retaliation *because of gender* is simply a form of retaliation prohibited by Title IX. *Cf. Brillhart v. Philips Electronics North America Corp.*, 179 F.3d 1271, 1273 (10th Cir. 1999) (state-law retaliation claim may proceed where plaintiff claims she was "terminated *because* she was an 'uppity' *female*") (emphasis added).

Title IX's preference for voluntary resolution pursuant to Section 902. 20 U.S.C. § 1682; *see also* 45 C.F.R. § 80.8(d) (1972) ("No action to effect compliance by any other means authorized by law shall be taken until . . . the responsible Department official has determined that compliance cannot be secured by voluntary means"). Even if third-party retaliation could survive the threshold of the implied-right analysis, the 1972 Congress likely would have assumed that this Court would consider Title VII, Section 902, and the implementing regulations by including an administrative-exhaustion requirement within any implied private right of action. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 178-79 (1994).

III. SCHOOLS HAVE NO NOTICE OF LIABILITY FOR THIRD-PARTY RETALIATION

Spending-Clause legislation like Title IX requires unambiguous congressional notice to federal recipients before federal funds will entail liability. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Title IX, the Eleventh-Circuit caselaw, the Title IX regulations, and the various sub-regulatory documents cited by Coach Jackson and his *amici curiae* provide no such notice for third-party retaliation.

A. Title IX's Statutory Terms Provide No Notice

As indicated in Section I.B, *supra*, retaliation for third-party advocacy is not discrimination *because of gender*, even if it is discrimination because of some other factor (*e.g.*, speech). Similarly, as indicated in Section II, *supra*, third-party retaliation would not provide Coach Jackson a private right of action even if the Court still implied rights of action. Accordingly, Title IX provides no statutory notice to

Birmingham that it faces retaliation liability for third-party retaliation claims.[9]

B. Title IX Caselaw Provides No Notice

For Birmingham, the persuasive authority in its jurisdiction holds that Title IX does not provide third-party retaliation claims. *Holt v. Lewis*, 955 F.Supp. 1385, 1389 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir.), *cert. denied*, 522 U.S. 817 (1997). As such, Birmingham lacked notice that it faced liability for the third-party retaliation claim that Coach Jackson attempts to set out in his complaint.

C. Title IX Regulation Provides No Notice

The regulations do not put Birmingham on notice of potential liability in this action for third-party retaliation because the regulations expressly provide that "No action to effect compliance by any other means authorized by law shall be taken until . . . the responsible Department official has determined that compliance cannot be secured by voluntary means." 45 C.F.R. § 80.8(d); 34 C.F.R. § 100.8(d). If it applies here, the *Cannon* implied private right of action falls within "any other means authorized by law" to secure compliance. But before Coach Jackson can enforce one provision of these regulations, he must comply with all conditions precedent under these regulations, which includes the Department's efforts to secure voluntary compliance. As a third-party beneficiary proceeding under the regulations, Coach Jackson cannot "cherrypick" from among the regulations he chooses to enforce. Because it dealt with a purely statutory action, the Court's *Cannon* decision is not to the contrary. *Cannon*, 441 U.S. at 688 n.8; *Sandoval*, 532 U.S. at 282 (*Cannon* to be a statutory violation).[10]

D. Agency Documents Issued outside Section 902 Have No Effect and, thus, Provide No Notice

The *amici* supporting Coach Jackson cite a variety of documents not promulgated pursuant to Section 902 (*i.e.*, published in the *Federal Register* and signed by the President). As such, pursuant to Section 902, the documents simply are not in effect and thus cannot provide notice to Birmingham. In this Section, *amicus* NWCA analyzes the presidential-approval requirement generally and then applies it to the principal authorities cited by *amici* in support of Coach Jackson.

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[9] As indicated in Section I.C, *supra*, the statutory prohibition against intentional discrimination can exceed the scope of agencies' authority. If the Court elects to hold that Title IX prohibits what Coach Jackson alleges, the Court can (and indeed should) do so without reference to the regulations, which exceed the agency's authority under Section 902 to the extent that they allow a claim for retaliation based on something other than gender.

[10] The regulation provides that the protection from retaliation extends not only to "any right or privilege secured by" Section 901(a) but also by "this part" (*i.e.*, by the regulations). 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e). To the extent that the Title IX regulations purport to create rights, those rights are not privately enforceable. *See Sandoval*, 532 U.S. at 291 (agencies cannot create rights); *cf. United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (agency regulations do not expand recipient's Title VI obligations under the intentional-discrimination standard).

With perhaps one limited exception not relevant here,[11] Title IX's Section 902 is identical to Title VI's Section 602. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. With no controlling legislative history for Title IX, the legislative history of Section 602 provides the only basis to understand the scope of Section 902. As the statute and its legislative history make clear, an agency must effectuate the statute via rules, regulations, and orders of general applicability, 42 U.S.C. § 2000d-1, which do not become effective unless and until signed by the President in the *Federal Register*.[12] 42 U.S.C. § 2000d-1; 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); *North Haven*, 456 U.S. at 522 n.12.[13]

[11] Senator Bayh said that Section 902 "permit[s] differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972) (emphasis added). Congress did not discuss a similar standard for Section 602.This case, however, presents neither a "very unusual case" of "absolutely necessary" gender-based "differential treatment" nor the implementation of the statutory prohibition of intentional gender-based discrimination.

[12] In 1980, the President delegated the rule-approval and enforcement authority to the Attorney General. 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250). In 1981, the Attorney General delegated enforcement authority (but not the rule-approval authority) to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division. 46 Fed. Reg. 29,704 (1981).

[13] As demonstrated by the following *partial* list, Title VI's proponents repeatedly cited presidential approval as the bulwark against bureaucratic overreaching. *See* 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong.

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Although cited by numerous *amici* supporting Coach Jackson, this Court's *Darrone* decision offers no help. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984). As the Court noted, the *Darrone* regulations had been approved pursuant to Executive Order 12,250 and had been adopted by a subsequent Congress into the committee report for an amendment to the Rehabilitation Act (*i.e.*, to the statute in question). *Id.* Significantly, the Attorney General signed the *Darrone* regulations. *See* 46 Fed. Reg. 40,686, 40,687 (1981). By contrast, here Congress has not adopted the retaliation provision in a committee report and never even considered whether the regulatory provision provides for private (as opposed to agency) enforcement.[14] *Darrone*, 465 U.S. at 634. Similarly, the Rehabilitation Act at issue

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Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott). Because no President or Attorney General has approved the Department of Education regulations, the Department of Health, Education, and Welfare's original Title IX regulations remain in effect. 20 U.S.C. § 3505(a).

[14] Several *amici curiae* in support of Coach Jackson note that Senator Bayh indicated that Title IX would be enforced like Title VI, which already included a regulatory prohibition against retaliation. This merely begs the question presented here. Until this Court's *Cannon* decision in 1979, it remained unclear whether Title IX implies a private right to enforce the statutory prohibition. Similarly, until this Court's *Jackson* decision in 2004 or 2005, it will remain unclear whether Title IX implies a private right to enforce retaliation regulations. None of this conflicts with Senator Bayh's comment that Title IX will be enforced like Title VI.

there does not have a presidential-approval provision like Section 902. Pub. L. No. 93-112, 87 Stat. 355 (1973). Thus, these documents fail to comply with Section 902, and under the plain language of Section 902, they have *no effect*, 20 U.S.C. § 1682, and thus warrant no deference and provide no notice.

1. Title IX Manual Has No Effect

Several briefs cite a manual prepared by the Civil Rights Division of the U.S. Department of Justice for the proposition that Title IX prohibits retaliation. *See, e.g.*, U.S. Br. at 17 (*citing* U.S. Dep't of Justice, Title IX Legal Manual, 57 (Jan. 11, 2001)). Prepared in the waning days of the Clinton Administration (and three months before this Court's *Sandoval* decision), three critical flaws render this document unworthy of deference, even if it had taken effect.

First, by its terms, the document is inapposite to actions that involve traditional educational institutions like Birmingham:

> this document is not intended to be a guide for Title IX enforcement with respect to traditional educational institutions such as colleges, universities, and elementary and secondary schools[.]

DOJ Manual, at 5. By expressly directing schools like Birmingham to ignore it, this document cannot provide notice of an interpretation that binds Birmingham.

Second, the DOJ Manual predates the April 2001 decision in *Sandoval*. Somewhat surprisingly, three years later in a *Sandoval*-related case, the United States cites the

DOJ Manual, notwithstanding that it relies on the following authorities for the proposition that an agency can adopt disparate-impact regulations: this Court's decisions in *Guardians Ass'n v. Civil Serv. Comm'n* and *Alexander v. Choate*, the *district court* decision in *Sandoval*, and a 1980 district-court case from Pennsylvania. *See* DOJ Manual, at 64 & n. 48.[15] This Court, however, reversed the *Sandoval* district court decision and noted that neither *Guardians* nor *Choate* held that agencies have such authority, which would be in considerable tension with the statute. 532 U.S. at 281-82. As such, the DOJ Manual cannot intelligently inform the debate here: namely, whether the retaliation regulation *defines*, as opposed to *expands*, the statute. Consistent with its pre-*Sandoval* vintage (and the government's position defeated in *Sandoval*), the DOJ Manual does not distinguish between Title IX the statute and Title IX the regulatory regime. Consequently, when the manual opines that "Title IX, like Title VI, recognizes three general types of prohibited discrimination" – namely, disparate treatment, disparate impact, and retaliation, *id.*, at 57 – the reader cannot know whether the writer considered retaliation enforceable under the statute or the regulatory regime. The writer did not consider the distinction even to exist.

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[15] The other district court case, *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539 (E.D. Pa. 1987), also is no longer good law: it holds that agencies can adopt disparate-impact regulations, that private parties can not enforce them, and that private parties can prevail based on a showing only of disparate impact. *See Sandoval*, 532 U.S. at 291 (agencies cannot create rights); *Fordice*, 505 U.S. at 732 n.7 (agency regulations do not alter recipient's burden under the intentional-discrimination standard).

Third, and finally, the DOJ Manual appears to be an outcome-oriented attempt to create law, not a thoughtful attempt to explain law, and so warrants no deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). For example, apparently because the writer would prefer it to be true, the DOJ Manual provides that Congress issued Title VI (and thus Title IX) under the Equal Protection Clause of the Fourteenth Amendment. DOJ Manual, at 56-57 & n.32. In doing so, the writer cites a Fifth Circuit decision for a proposition that the Fifth Circuit did not hold.[16] The legislative history could not state more clearly that Congress adopted Title VI *solely* under the Spending Clause, 110 Cong. Rec. 1527 (1964) ("Title VI is not an exercise of regulatory authority over activities within the States . . . and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available") (prepared analysis submitted by Rep. Celler when introducing his bill to the House);[17] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999), and nothing in Title IX's legislative history distinguishes it from Title VI in this regard.

[16] Specifically, the DOJ Manual cites *Pederson v. Louisiana State Univ.*, 201 F.3d 388, 406 (5th Cir. 2000), *aff'd in part, rev'd in part*, 213 F.3d 858 (5th Cir. 2000). As part of its sovereign-immunity analysis, the *Pedersen* court asked whether Congress *could have enacted* Title IX pursuant to the Fourteenth Amendment, not whether Congress *did enact* Title IX pursuant to the Fourteenth Amendment. *See id.*

[17] *See also* 110 Cong. Rec. 6546 ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed'") (Sen. Humphrey, *quoting Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947)).

2. Harassment Guidance Has No Effect

Several briefs cite *Federal Register* notices issued by the Department of Education on sexual harassment: Sexual Harassment Guidelines, 62 Fed. Reg. 12,034, 12,044 (1997), and Proposed Revised Sexual Harassment Guidelines, 65 Fed. Reg. 66,092, 66,106 (2000). Although issued in the *Federal Register,* these documents nonetheless have not been approved pursuant to Section 902; thus, they have not taken effect. In addition, the November 2000 document is proposed, not final, which further argues against any deference. Finally, because both documents predate *Sandoval,* their statements that "Title IX" prohibits retaliation do not resolve this issue here because – consistent with its position in the *Sandoval* litigation and with the DOJ Manual – the Department of Education used "Title IX" and the "Title IX regulatory regime" interchangeably.

3. 1979 Policy Interpretation Has No Effect

Several briefs cite a *Federal Register* "policy interpretation" on intercollegiate athletics issues by the Department of Education's predecessor: 44 Fed. Reg. 71,413 (1979). In addition to the lack of presidential approval, the policy interpretation suffers two additional flaws that render it without effect and, thus, without notice. Unlike the original Title IX regulations, the 1979 policy interpretation never took effect under either Section 902 or the "laying before" provisions discussed in *North Haven.* Indeed, to avoid the need for presidential approval and a new rulemaking, in an Office of General Counsel opinion widely circulated at the time, the Department's predecessor took the position that the

policy interpretation was neither a "rule" nor an "interpretation," and thus did trigger any procedural requirements. *See* "HEW Policy Lacks Force of Law," *The NCAA News*, 1. 5 (Jan. 31, 1980) (certified archival copies on file with NWCA and with the complaint in No. 03-2588-EGS (D.D.C.).[18] Therefore, the policy determination did not continue in effect under the transition provisions of the act that created the Department of Education. *See* 20 U.S.C. § 3505(a) (only "rules" that were "in effect" on May 4, 1980 continue in effect). Because it did not comply with Section 902, and it did not survive the transition from the Department of Health, Education & Welfare to the Department of Education, the 1979 policy interpretation provides no notice to recipients.

IV. EDUCATORS HAVE RETALIATION REMEDIES

To justify the harshness of dismissal here and to answer the claims of various *amici curiae* who supported Coach Jackson, this Court should clarify that he had other remedies at his disposal. First, as an educator at a public school, Coach Jackson clearly could have brought this action under the First Amendment. *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968); *Connick v. Myers*, 461 U.S. 138, 149 (1983).[19] Second, if he had cast himself as the *direct* victim of prohibited gender

[18] The *NCAA News* article is available at http://www.ncaa.org/news/1980/19800131.pdf.

[19] *Cf. also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (the Equal Protection Clause enables a "class of one" to challenge a disparate treatment under a rational-basis analysis).

discrimination, Coach Jackson could have asserted a claim under Title IX or Title VII. As the master of his own complaint, however, Coach Jackson declined to bring those claims, leaving the Court with the interesting issues presented here.

Under Title IX, an educator can state a retaliation claim if he or she can allege to have suffered discrimination because of gender. For example, if a recipient retaliated against a male (or female) teacher for defending the rights of male (or female) students, but would not have done so against a female (or male) teacher defending the rights of female (or male) students, that teacher could bring an action directly under Title IX. Thus, like sexual harassment, retaliation is simply a form of intentional, gender-based discrimination prohibited by Title IX. 20 U.S.C. § 1681(a); *cf., e.g., Brillhart v. Philips Electronics North America Corp.*, 179 F.3d 1271, 1273 (10th Cir. 1999) (state-law retaliation claim may proceed where plaintiff claims she was "terminated *because* she was an 'uppity' *female*") (emphasis added).[20]

[20] If the facts support it, a coach or teacher can allege the direct injury of being an involuntary participant in a school's discrimination against athletes or students. Directly or indirectly, this may give the coach or teacher third-party standing to assert the equal-protection rights of the athletes or students. Upon prevailing under such a theory, the court's remedial powers (or DE's administrative process) presumably could require reinstatement. As indicated in the Factual Background, *supra*, however, Coach Jackson does not even allege that the girls' basketball team suffered discrimination under Title IX, much less that he suffered discrimination under Title IX.

Under Title VII, an employer that discriminates against third parties (*e.g.*, students, customers) can create a hostile work environment for its employees. Thus, for example, if a job forces a female (or male) teacher to tolerate sufficiently egregious treatment of female (or male) students, the teacher would have a viable Title VII claim. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (*citing* 45 Fed. Reg. 74,676 (1980) and *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).[21]

V. THIS COURT SHOULD NOT PROPAGATE MISSTATEMENTS BY *AMICI CURIAE*

The *amici curiae* briefs in support of Coach Jackson highlight why an appellate court generally should disregard extra-record material not subjected to an adversary proceeding below. Although this Court's May 2003 amendment to Rule 32 has saved the Court from serving as a repository for extraneous information lodged with the Clerk, the Internet enables parties and *amici curiae* to cite any self-serving document imaginable, which opposing parties and *amici curiae* ignore at their peril. The risk of this Court's placing its imprimatur on false or misleading information is simply too great not to respond.

Particularly at the administrative and nongovernmental-organization level, Title IX has been dominated for decades by one side of the debate. Since becoming involved with Title IX advocacy in 2002, *amicus curiae* NWCA has come to appreciate the intended and unintended irony of former Vice President Mondale's remark during the Reagan-Mondale debate in 1984:

> It's not what he doesn't know that bothers me. It's what he knows for sure that just ain't so.

Transcript of Louisville Debate Between Reagan and Mondale, *New York Times*, B4 (Oct. 8, 1984) (quoting Will Rogers). Vice President Mondale's intended irony certainly applies to Title IX: much of what goes for fact just is not so.

His unintended irony simply amplifies the point: Will Rogers is not the source for the quotation. *See* Suzy Platt (ed.), *Respectfully Quoted: a Dictionary of Quotations Requested from the Congressional Research Service*, 185 (Library of Congress 1989).

A. *Amici Curiae* Overstate Increases in Scholastic and Collegiate Athletic Opportunities

Several *amici curiae* briefs include widely published (but nonetheless significantly overstated) claims that girls' interscholastic athletic participation increased more than 800 percent and women's intercollegiate participation increased more than 400 percent since Title IX's enactment in 1972.

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[21] *Rogers* held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic customers: "the phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Rogers*, 454 F.2d at 238. As indicated in the Factual Background, *supra*, however, Coach Jackson does not even allege that the girls' basketball team suffered discrimination *because of gender*.

See, e.g., Amicus Curiae Br. of Women's Sports Foundation, *et al.*, at 13-14; Bayh Br. at 21-22.

The overstatement in girls' interscholastic growth results from understated data collected and published by the National Federation of High School Associations ("NFHSA") in 1972. Many states reported total athletes, without separate girls' and boys' totals. *See* NFHSA, 1971-72 Sports Participation Survey, at 77-85 (1972) (available from NFHSA; on file with NWCA).[22] For such states, NFHSA counted all athletes as boys. As a result, for example, boys accounted for more than one in three field hockey players in 1971-72, *id.* at 76, notwithstanding that U.S. field hockey was then and is now an almost entirely female sport. The data significantly undercount girls' 1971-72 participation because many states did not report participation by gender in 1971-72.

The overstatement in women's intercollegiate growth results from incomplete data. The sources cited by *amici curiae* compare reported participation at 722 schools in the National Collegiate Athletic Association ("NCAA") in 1971-72 versus participation in 1,319 schools in 1998-99. In addition, the NCAA acknowledges that its members' data are under-inclusive for sports in which NCAA did not sponsor sports championships (*i.e.*, all women's sports in 1971-72).[23]

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[22] The following states report no girl athletes: Alaska, California, District of Columbia, Illinois, Indiana, Iowa, Minnesota, Nevada, New York, Pennsylvania, and Utah. *Id.*

[23] NCAA, 1982-2003 Sports Sponsorship and Participation Report, at 10 (2004) (http://www.ncaa.org/library/research/participation_rates/1982-

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See generally Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487 (D.D.C. 1983), *aff'd* 735 F.2d 577 (D.C. Cir. 1984). Finally, the data do not include the participation in the Association for Intercollegiate Athletics for Women, the preeminent women's intercollegiate athletic conference in 1971-72. For all the foregoing reasons, the data significantly undercount women's participation in 1971-72.

B. *Amicus Curiae* Misidentifies Title IX's Author and Codification

In his *amicus curiae* brief, former Senator Bayh claims to have authored Title IX as an amendment to the Higher Education Act of 1965. Bayh Br. at 13-15, 17 & n.8. If not for the legal import of the latter comment, *amicus curiae* NWCA could overlook the otherwise trivial oversight of the former comment.

Representative Edith Green of Oregon authored Title IX. *See, e.g.*, Comment, Implementing Title IX: The HEW Regulations, 124 Pa. L. Rev. 806, 808-09 & n.20 (1976). On April 6, 1971, on behalf of herself and Representative Perkins, Representative Green introduced Title IX in the House as part of the "Higher Education Act of 1971." 117 Cong. Rec. 9821 (1971) (it was Title X of the bill, as introduced). *Four months later*, on August 6, 1971, Senator Bayh attempted to introduce Title IX in the Senate as a floor

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2003/2003ParticipationReport.pdf) ("For sports in which the NCAA does not offer a championship, the data are even less likely to be precise").

amendment, 117 Cong. Rec. 30,399 (1971), which was ruled non-germane to the parallel legislation then pending in the Senate. 117 Cong. Rec. 30,415. On February 28, 1972, Senator Bayh re-introduced Title IX as a floor amendment in the Senate. 118 Cong. Rec. 5802 (1972). In the first sentence of his prepared statement to the 1975 hearings on the Title IX regulations, Senator Bayh identifies himself as the "Senate sponsor of Title IX." Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., at 168 (1975) (hereinafter "1975 Hearings").

Senator Bayh does not cite any authority (other than his purported authorship) to support his claim that Title IX, 20 U.S.C. §§ 1681-1688 (codified at Chapter 38), amended the Higher Education Act of 1965, 20 U.S.C. §§ 1001-1140d (codified at Chapter 28). No such authority exists. The legislative reports on what became the Education Amendments of 1972 describe it as an act to amend several enumerated acts (including the Higher Education Act of 1965 and several others) and for "other purposes." *See, e.g.*, S. Conf. Rep. No. 92-798, *reprinted in* 1972 U.S.C.C.A.N. 2608. The legislative history unambiguously places Title IX among the "other purposes." The House report's section-by-section analysis lists more than 60 amendments to the Higher Education Act of 1965, H.R. Rep. No. 92- 554, *reprinted in* 1972 U.S.C.C.A.N. at 2548-80, but does not include Title IX among those amendments, *id.* at 2566-67.[24] Similarly, neither

[24] *See also* S. Conf. Rep. No. 92-798, *reprinted in* 1972 U.S.C.C.A.N. 2671-72 (conference report); *compare* Pub. L. No. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972) (Title IX does not mention of Higher

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Senator Bayh's 1972 floor amendment nor Title IX (as enacted) mentions the Higher Education Act of 1965. *See* 118 Cong. Rec. 5802-14; Pub. L. No. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972).[25]

However trivial these rebuttals may seem, they have both legal and practical significance. First, the statute that created the Department of Education did not transfer its predecessor's Title IX authority to the newly created department, but did transfer the predecessor's authority under the Higher Education Act of 1965. *See* 20 U.S.C. § 3441(a)(2)(B). As such, Senator Bayh's claim is directly relevant to whether the Department of Education can claim a delegation of legislative authority to implement Title IX. *See Amicus Curiae* Brief of College Sports Council, at 18-19 & n.11.

Second, after Title IX's enactment, as both a Senator and a private lawyer-lobbyist, Senator Bayh has served as a leading proponent of an expansive reading of Title IX. His *amicus curiae* brief ably presents his position. By contrast,

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Education Act of 1965) *with id.* at § 1001, 86 Stat. at 375 ("Part A of the Higher Education Act of 1965 is amended . . ."));

[25] Senator Bayh mentioned to the Nixon Administration's "Higher Education Act," 118 Cong. Rec. 5804, but that refers to pending legislation, not the previously enacted Higher Education Act of 1965. *See also* 1975 Hearings, at 468 ("Title IX, viewed strictly, is a free-standing statute not an amendment to existing law") (letter from John B. Rhinelander, General Counsel of the Department of Health, Education & Welfare).

Representative Green remained a proponent of the moderate bill that she and her colleagues in the 92nd Congress enacted. *See, e.g.*, 117 Cong. Rec. 39,262 (1971) ("a quota system would hurt our colleges and universities [and I oppose them] even in terms of attempting to end discrimination on the basis of sex.") (Rep. Green accepting what became 20 U.S.C. § 1681(b) as a floor amendment); 1975 Hearings, 480 ("When funds for athletic departments come out of Federal grants, fees, and tax dollars, women students are to have equal opportunity with men, but intercollegiate sports financed by gate receipts is an entirely different matter and not covered by title IX") (quoting floor statement by Rep. Green).

CONCLUSION

Because it does not allege a violation of Title IX and, in any event, failed to follow the required administrative procedures, *amicus curiae* NWCA urges this Court to affirm the dismissal of Coach Jackson's complaint.

October 7, 2004

Respectfully submitted,

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